No. 85-243

Supreme Court of the United States

October Term, 1985

AUG 29 1985
JOSEPH F. SPANIOL, JR.
CLERK

SERVICE, HOSPITAL, NURSING HOME & PUBLIC EMPLOYEES UNION, LOCAL NO. 47, AFFILIATED WITH THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC,

Petitioner,

vs.

COMMERCIAL PROPERTY SERVICES, INC.; CLEVELAND CLEANING AND MAINTENANCE COMPANY; TOTAL SYSTEMS MANAGEMENT, INC.; ANTARES, INC.; AND FIRST UNION MANAGEMENT, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT T. ROSENFELD
Counsel of Record for Commercial Property Services, Inc., Total Systems Management, Inc., and Antares, Inc.
WALTER, HAVERFIELD, BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

GREGORY P. SZUTER
Counsel of Record for Cleveland Cleaning and Maintenance Company
SCHWARTZ, EINHART & SIMERKA
800 National City Bank Building
Cleveland, Ohio 44114
(216) 771-4180

BEST AVAILABLE COPY

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 771-2345

QUESTION PRESENTED FOR REVIEW

Whether in an action brought under Section 301 of the LMRA, 1947, 29 U.S.C. §185, a non-signatory to a collective bargaining contract may be compelled to arbitrate a dispute arising under that contract without a judicial determination that the non-signatory is bound by the contract to so arbitrate.

TABLE OF CONTENTS

Table of Authorities II
Statute Involved 1
Statement of Case 3
Statement of Facts 4
Argument 7
Conclusion 9

TABLE OF AUTHORITIES

Cases

American Bell v. Telephone Workers, 736 F.2d 879 (3rd Cir. 1984) 8
Atkinson v. Sinclair Refining Co., 370 U.S. 238, 8 L. Ed. 2d 462, 82 S. Ct. 1318 (1962) 7
Carpenters Local Union No. 1846 v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 78 L. Ed. 2d 305, 104 S. Ct. 335 (1983) 7, 8
Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 38 L. Ed. 2d 583, 94 S. Ct. 629 (1974) 7
General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Public Service Company of Indiana, 705 F.2d 238 (7th Cir. 1983) 8
Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 41 L. Ed. 2d 46, 94 S. Ct. 2236 (1974) 8, 9
International Union of Operating Engineers Local 150 v. Flair Builders, 406 U.S. 487, 32 L. Ed. 2d 248, 92 S. Ct. 1710 (1972) 7

John Wiley & Sons v. Livingston, 376 U.S. 543, 11 L. Ed. 2d 898, 84 S. Ct. 909 (1964) 7

Las Vegas Local Joint Executive Board of Culinary Workers and Bartenders v. Las Vegas Hacienda, Inc., 383 F.2d 667 (9th Cir. 1967), *cert. denied*, 390 U.S. 958, 19 L. Ed. 2d 1153, 88 S. Ct. 1037 (1968) 8

NLRB v. Burns Security Services, 406 U.S. 272, 32 L. Ed. 2d 61, 92 S. Ct. 1571 (1972) 8

United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L. Ed. 2d. 1409, 80 S. Ct. 1347 (1960) 7

Statutes

9 U.S.C. §4 ..... 1, 8

No. 85-243

Supreme Court of the United States

October Term, 1985

SERVICE, HOSPITAL, NURSING HOME & PUBLIC EMPLOYEES UNION, LOCAL NO. 47, AFFILIATED WITH THE SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC,

Petitioner,

VS.

COMMERCIAL PROPERTY SERVICES, INC.; CLEVELAND CLEANING AND MAINTENANCE COMPANY; TOTAL SYSTEMS MANAGEMENT, INC.; ANTARES, INC.; AND FIRST UNION MANAGEMENT, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTE INVOLVED

United States Code, Title 9, "Arbitration"

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the

parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.

STATEMENT OF THE CASE

On February 22, 1983, the Petitioner, Service, Hospital, Nursing Home and Public Employees Union, Local 47 ("Union" or "Petitioner" or "Local 47") filed an amended complaint against Respondents, Cleveland Cleaning and Maintenance Company ("CCM"), Total Systems Management ("TSM"), Antares, Inc.,[1] and against Commercial Property Services, Inc. ("CPS") and First Union Management ("First Union") (not parties to the instant proceeding in this Court) demanding that all five entities arbitrate certain grievances previously filed by the Union against CPS and CCM.

On September 21, 1983, the District Court for the Northern District of Ohio issued its decision ordering CPS and CCM to arbitrate, and dismissed the complaint as it pertained to TSM and Antares. The complaint had previously been dismissed as to First Union.

CPS and CCM appealed the September 21 order and the Union appealed the order of dismissal as to TSM, Antares and First Union.

On February 21, 1985, the Sixth Circuit Court of Appeals at 755 F.2d 499, sustained the lower court's dismissal orders as to TSM, First Union and Antares, sustained the order to arbitrate as to CPS (the signatory employer) and reversed and remanded the order as to CCM (the non-signatory), directing the Court on remand to determine whether CCM was an alter ego of CPS, a single employer with CPS or whether some other reason existed to pierce the corporate veil surrounding CCM.

---

1. The Respondents, Commercial Property Services, Inc., Total Systems Management, Inc. and Antares, Inc., list the following subsidiaries, affiliates and joint ventures, not otherwise named, pursuant to United States Supreme Court Rule 28.1:

Commercial Protective Services, Inc.

Mercury West, Inc.

The Union has petitioned this Court to review the Sixth Circuit's Order as to CCM, TSM and Antares.

STATEMENT OF FACTS

CPS is an Ohio corporation formed in 1974 by Patrick J. Cassese and others and is engaged in janitorial cleaning services for commercial buildings. While CPS operates nationally, only the Cleveland, Ohio, office is involved in these proceedings. Since its inception, CPS has recognized the Union as the representative of its janitorial employees in the Greater Cleveland area. CPS and Local 47 have been parties to successive collective bargaining agreements, the most recent of which was effective from May 1, 1981, to April 30, 1984.

Cassese is the Chairman of the Board, President and Chief Executive Officer of CPS. Cassese owned 49 percent of the stock of CPS, while twelve other partners owned the remaining 51 percent until November, 1982, when their stock was acquired by Antares.

TSM is a wholly-owned subsidiary of CPS formed in 1978 to serve as a management consulting company for small building owners. Janitorial workers were not employed by TSM, but rather were provided by subcontractors. TSM has not conducted any business since June, 1982.

Antares, a Pennsylvania corporation, was formed by Cassese in November, 1982, for the purpose of purchasing the stock of his partners in CPS. In this manner, Cassese became the owner of 100 percent of Antares, which in turn owns 100 percent of CPS. Antares has not at any time employed janitorial workers and has no assets except for the stock of CPS.

CCM was purchased by Jack Cornachio from his uncle in 1976 as a non-union janitorial service business servicing only buildings located in Greater Cleveland. Cornachio and Cassese are not related.[2] CCM held subcontracts with TSM in addition to securing its own cleaning contracts with small building owners.

In October, 1982, Cassese purchased 70 percent of the CCM stock from Cornachio. Cornachio retained 50 percent of the CCM voting control pursuant to an irrevocable ten-year proxy given to him by Cassese.

Cornachio continued as President and operational manager of CCM as he had been prior to the stock sale. Cassese's interest in CCM was limited to stock dividends and loan interest, not to CCM profits or salaries. The Cornachio-Cassese financial agreement was consummated at a time when Cassese held a minority interest in CPS prior to the formation of Antares.

CCM is a non-union operation centered in the Greater Cleveland area. CCM has competed with CPS for janitorial accounts. Its bookkeeping, banking and accounting firms are separate from those of CPS. The officers, directors and employees of each company are distinct. The offices of the two companies are separated by approximately twenty miles. Since Cassese's purchase of CCM stock, the daily and overall operations of each company have remained unchanged.

First Union Management, Inc. (hereinafter referred to as First Union) operates and manages downtown Cleveland properties as well as other buildings owned by First Union Real Estate Investments. First Union hires contractors to provide cleaning services in the various prop-

---

2. The Circuit Court at 755 F.2d 502 erroneously referred to Cassese as Cornachio's uncle.

erties and buildings it manages, including the Illuminating Building and Rockwell properties in Cleveland.

Prior to February, 1983, the Illuminating Building had been cleaned by Local 47 employees employed by National Cleaning Contractors ("National") under a "site contract" between National and Local 47. The Rockwell Building had been cleaned by Local 47 members employed by National under a multi-site agreement similar to Petitioner's Exhibit A.

In December, 1982, First Union accepted bids from CPS, National and other Cleveland area Union and non-union contractors, including CCM, for the janitorial cleaning of the Rockwell and Illuminating Buildings as separate accounts. CCM was awarded the contracts at both buildings, effective in February, 1983. CCM hired its own work force to staff the buildings, none of whom were members of Local 47. National laid off its Local 47 employees when it lost the First Union accounts.

On February 7, 1983, the Union presented grievances to CPS President Cassese (Petitioner's Exhibit B). These grievances asserted that CCM was the alter ego of CPS, and therefore CCM violated the work preservation provisions of the contract in effect between CPS and the Union by taking over various cleaning accounts, including the Rockwell and Illuminating Buildings, and not hiring the former National employees. The Union also alleged that CCM was an Employer under Article XXI of the CPS collective bargaining agreement (Petitioner's Exhibit A) because of its alleged financial relationship with Cassese.

The grievances demanded that CCM retain the former Union employees under the work preservation clauses of Local 47 contracts. CCM refused to arbitrate the grievance on the ground that it was not a signatory to the CPS-Local 47 contract, and thus not bound thereby. CPS refused to

arbitrate on the grounds that the employees were not CPS', nor had it acquired the First Union accounts. No grievance was ever filed against TSM, Antares or First Union.

ARGUMENT

The Union would have the Court order CCM, TSM and Antares, which are not signatory to a contract, to arbitrate a dispute by virtue of another entity, CPS, agreeing that they were bound to so arbitrate. No reported case supports such a proposition, and the proposition itself is contrary to the entire concept of arbitration, i.e., a voluntary, *contractual* method of resolving disputes.

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *Gateway Coal Co. v. UMW*, 414 U.S. 368, 374 (1974); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547 (1964); *Atkinson v. Sinclair Refining*, 370 U.S. 238, 241 (1962); *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 501 (5th Cir. 1982), *cert. denied* 78 L. Ed. 2d 305 (1983).

"Nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration. That issue as well as the scope of the arbitration clause remains a matter for judicial decision." *Int. Union of Operating Engineers Local 150 v. Flair Builders*, 406 U.S. 487, 491 (1972).

> "If [the union's] position were upheld, it would do violence to the judicial process by forcing a stranger to an agreement to submit to arbitration a justiciable issue as to whether he is bound by the agreement." *Office Employees Int. Union Local 153 v. Ward-Garcia Corp.*, 190 F. Supp. 448, 449 (1961).

This view is also expressed by the U. S. Arbitration Act, 9 U.S.C. §4, "If the making of the arbitration agreement . . . be in issue, the court shall proceed summarily to the trial thereof. . . . If the jury find that no agreement in writing for arbitration was made . . . the proceeding shall be dismissed."

The principles of labor law and arbitration enunciated by the Sixth Circuit follow not only the procedures clearly set forth by this Court and by the statute, but also agree with decisions from other circuits which have ruled on the subject. *General Drivers, Warehousemen and Helpers, Local Union No. 89 v. Public Service Company of Indiana,* 705 F.2d 238 (7th Cir. 1983); *Las Vegas Joint Council v. Las Vegas Hacienda, Inc.,* 383 F.2d 667 (9th Cir. 1967), *cert. denied* 390 U.S. 958, 19 L. Ed. 2d 1153 (1968); *Pratt-Farnsworth, supra; American Bell v. Telephone Workers,* 736 F.2d 879 (3rd Cir. 1984).

It must be remembered that the Union's grievance has not been dismissed. CPS has been ordered to arbitrate. If the District Court finds that CCM is bound by the CPS contract to arbitrate, then indeed the Union will have its desired remedy against CCM—arbitration. If however, CCM is not found to be an alter ego, then its conduct in acquiring the First Union accounts, and hiring of employees, is to be governed by *NLRB v. Burns Security Services,* 406 U.S. 272 (1972) (a successor employer is free to hire its initial work force and is not obligated to assume the predecessor's labor contract) and by *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974) (a successor may not be compelled to arbitrate its obligations to its predecessor's employees).

For the reasons set forth in the Court of Appeals Decision, 755 F.2d at 507, TSM and Antares were properly dismissed.

CONCLUSION

In a suit brought under Section 301(a) of LMRA to compel arbitration pursuant to a collective bargaining contract, the District Court only has jurisdiction over a party to the contract.

Whether one is a party or otherwise bound to the contract is a matter for the Court, not the arbitrator, to decide.

This Court has unwaiveringly followed that principle. The Sixth Circuit, pursuant to *Howard Johnson*, correctly reversed the District Court order in this regard, and remand is proper to factually determine whether CCM is the alter ego of CPS, or whether CPS and CCM constitute a single employer or whether some other circumstance exists which would warrant piercing CCM's corporate veil to give §301 jurisdiction over CCM.

Respectfully submitted,

ROBERT T. ROSENFELD
Counsel of Record for Commercial Property Services, Inc., Total Systems Management, Inc., and Antares, Inc.
WALTER, HAVERFIELD, BUESCHER & CHOCKLEY
1215 Terminal Tower
Cleveland, Ohio 44113
(216) 781-1212

GREGORY P. SZUTER
Counsel of Record for Cleveland Cleaning and Maintenance Company
SCHWARTZ, EINHART & SIMERKA
800 National City Bank Building
Cleveland, Ohio 44114
(216) 771-4180